

Message Text

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FM SECSTATE WASHDC
TO AMEMBASSY LIMA IMMEDIATE

C O N F I D E N T I A L STATE 165796

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E.O. 11652: GDS

TAGS: EWWT, PE

SUBJECT: FMC INVESTIGATION OF SHIPPING AGREEMENTS

1. THE FEDERAL MARITIME COMMISSION (FMC) ON JULY 8 SERVED AN ORDER OF INVESTIGATION AND HEARING INTO TWO POOLING AND EQUAL ACCESS AGREEMENTS BETWEEN CPV AND PRUDENTIAL LINES IN THE U.S. ATLANTIC TO PERU TRADE (AGREEMENT 10041-4), AND CPV AND LYKES BROTHERS SHIPPING LINES IN THE U.S. GULF TO PERU TRADE (AGREEMENT 10044-3). THE AGREEMENTS DO NOT APPLY TO PERUVIAN EXPORT TRADE TO THE U.S., WHICH IS LARGELY BULK PRODUCTS THAT U.S. LINER VESSELS DO NOT USUALLY CARRY.

2. THE ORDER EXTENDED THE TWO AGREEMENTS UNTIL SEPTEMBER 27 1977, TO PROVIDE QUOTE SUFFICIENT TIME FOR THE LINES TO REORDER THEIR AFFAIRS UNQUOTE. FMC'S PRESENT INTENTION
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CLEARLY IS TO DISAPPROVE THE AGREEMENTS, AND TO MOVE TOWARD IMPOSING EQUALIZING FEES ON U.S. EXPORT CARGO CARRIED BY PERUVIAN CARRIERS. THE EQUALIZING FEES WOULD OFFSET THE PENALTIES IMPOSED ON PERUVIAN IMPORTERS WHO USE SHIPPING LINES THAT ARE NOT FAVORED BY PERUVIAN CARGO RESERVATION LAWS, ASSUMING THE LAWS CONTINUE TO BE ENFORCED IN THE FOREIGN COMMERCE OF THE U.S.

3. THE TONE OF THE ORDER IS ACCUSATORY, AND ITS WORDING IS BLUNT. THE ORDER ASSERTS INTER ALIA THAT THE AGREEMENTS QUOTE REPRESENT THE ULTIMATE IN ANTICOMPETITIVE ARRANGEMENTS. THERE IS NO COMPETITION AS TO PRICE OR QUALITY OF SERVICE AND THE VOLUME OF SUPPLY IS FIXED BY SETTING THE NUMBER OF SAILINGS. THE ILLEGALITY OF SUCH ACTIVITIES UNDER THE SHERMAN ACT IS WELL ESTABLISHED UNQUOTE. AS PART OF THE HEARING PROCESS THE PARTIES (CPV, PRUDENTIAL, AND LYKES) ARE DIRECTED TO ADDRESS THEMSELVES TO A NUMBER OF SPECIFIC QUESTIONS INCLUDING: WHETHER THE EQUAL ACCESS PROVISIONS OF THE AGREEMENTS ARE CONTRARY TO THE PUBLIC INTEREST IN THAT THEY ARE IN FURTHERANCE OF DISCRIMINATORY AND ANTICOMPETITIVE LAWS OF THE GOVERNMENT OF PERU WHICH EXCEED JUSTIFIABLE LIMITS IN RESTRICTING TRANSPORTATION IN THE COMMERCE OF THE UNITED STATES.

4. ATTORNEYS FOR BOTH CPV AND PRUDENTIAL INFORMED THE DEPARTMENT THAT THE PERUVIAN LINE WOULD NOT PARTICIPATE IN THE FMC HEARING SINCE THE GOP REGARDED THE LANGUAGE OF THE ORDER AS OFFENSIVE TO ITS SOVEREIGNTY, AND MAY REVOKE ITS APPROVAL OF ARRANGEMENTS WHICH ALLOWED LYKES AND PRUDENTIAL ACCESS TO CARGO RESERVED TO PERUVIAN CARRIERS AND ASSOCIATED CARRIERS. THIS PRESUMABLY MEANS THAT THE TWO U.S.-FLAG CARRIERS MAY HAVE BEEN OR SHORTLY COULD BE DENIED ACCESS TO THE APPROXIMATELY 80 PERCENT OF CARGO

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IN THE U.S./PERU TRADES THAT IS SUBJECT TO PERUVIAN CARGO PREFERENCE LAWS.

5. ACTION REQUESTED: EMBASSY REQUESTED URGENTLY TO CONSULT WITH GOP TO ASCERTAIN IF GOP HAS REVOKED OR PLANS TO REVOKE THE AGREEMENTS AS REPORTED IN PARA 4. IF SO, EMBASSY SHOULD SEEK TO PERSUADE GOP NOT TO CANCEL ITS RECOGNITION OF AGREEMENTS IF IT HAS NOT YET DONE SO, OR TO REVERSE ITS CANCELLATION IF IT HAS ALREADY TAKEN THAT STEP. EMBASSY SHOULD MAKE THE FOLLOWING ARGUMENTS:

A) THE FMC IS AN INDEPENDENT REGULATORY AGENCY, AND ITS THINKING ON APPROVABILITY OF AGREEMENTS IS NOT OFFICIAL U.S. GOVERNMENT POLICY.

B) OFFICIAL USG POLICY IS: ALTHOUGH WE BELIEVE THAT COMPETITION AMONG SHIPPING LINES BENEFITS TRADE INTERESTS AND THAT CARGO-SHARING SCHEMES ARE, IN THE LONG RUN, DETRIMENTAL TO THOSE PROTECTED, WE RECOGNIZE THAT MANY COUNTRIES DO NOT SHARE THOSE VIEWS, AND THAT SHIPPING LINES OPERATE IN THE WORLD AS IT IS, NOT AS WE MIGHT LIKE IT TO BE. MANY COUNTRIES HAVE IMPLEMENTED, OR ARE LIKELY

TO IMPLEMENT, MEASURES INTENDED TO PROMOTE THEIR OWN MERCHANT FLEETS, AND SUCH MEASURES CREATE OBVIOUS PRESSURES ON U.S.-FLAG SHIPPING LINES TO ENTER INTO COMMERCIAL CARGO SHARING AGREEMENTS IN ORDER TO PARTICIPATE IN THOSE TRADE ROUTES.

THE QUESTION OF WHETHER PARTICULAR CARGO SHARING ARRANGEMENTS LEAD TO BENEFITS WHICH MAKE THEM IN THE PUBLIC INTEREST, EVEN THOUGH THEY MAY RESTRICT COMPETITION, MUST BE DETERMINED ON A CASE-BY-CASE BASIS. THEREFORE, OUR GENERAL VIEWS REGARDING CARGO SHARING ARRANGEMENTS DO NOT SUGGEST THAT SUCH AGREEMENTS SHOULD BE REJECTED IN ALL CASES.

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C) CONSISTENT WITH THE EXPRESSION OF POLICY IN POINT B, USG AGENCIES WILL SUBMIT COMMENTS AND POLICY GUIDANCE TO THE FMC ON THEIR VIEWS AS TO THE APPROVABILITY OF THE AGREEMENTS UNDER INVESTIGATION. IN PARTICULAR, THESE COMMENTS WILL ADDRESS WHETHER THE AGREEMENTS MEET THE APPROVABILITY STANDARDS LAID DOWN BY THE SUPREME COURT, AS TO SECURING OF IMPORTANT PUBLIC BENEFITS, AND SERIOUS TRANSPORTATION NEED.

D) IF THE PERUVIAN GOVERNMENT CANCELS ITS RECOGNITION OF THE AGREEMENTS, THERE IS A SERIOUS LEGAL QUESTION AS TO WHETHER THEY REMAIN SUBJECT OF FORMAL PROCEEDINGS BEFORE THE FMC, AND THUS WHETHER THE USG CAN ENTER ITS OFFICIAL COMMENT INTO THE PROCEEDINGS. CONTINUED PERUVIAN RECOGNITION OF AGREEMENTS WOULD NOT NECESSITATE ACTIVE CPV PARTICIPATION IN FMC HEARINGS, IF GOP STILL RELUCTANT TO RESPOND TO FMC ORDER.

6. FYI. OTHER FACTORS WHICH EMBASSY SHOULD BE AWARE OF BUT SHOULD NOT MENTION TO PERUVIANS ARE:

A) SENIOR PERSONNEL CHANGES ARE EXPECTED SOON AT FMC, AND THEIR EFFECT ON FMC POLICY IS AT THIS POINT UNCLEAR;

B) DEPARTMENT OF JUSTICE ANTITRUST DIVISION, WHICH WOULD NORMALLY OPPOSE POOLING AND EQUAL ACCESS AGREEMENTS, IS CONCERNED THAT RESULT OF DISAPPROVAL OF THESE POOLING AGREEMENTS MAY ULTIMATELY BE AN EVEN MORE ANTICOMPETITIVE SITUATION AND ANY COMMENTS JUSTICE MAY SUBMIT TO FMC MAY WELL REFLECT THIS LONG-TERM VIEW. END FYI.

7. EMBASSY REQUESTED TO REPORT ANY BACKGROUND INFORMATION IT MAY DEVELOP, ANY PRESS OR OTHER PUBLIC TREATMENT, CONFIDENTIAL

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AND ITS EVALUATION OF POSSIBLE IMPACT ON U.S./PERUVIAN
RELATIONS. VANCE

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Message Attributes

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